INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 84

UNITED STATES,

Appellant,

v.

MILAN VUITCH, M.D.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC. AS AMICUS CURIAE

INTEREST OF HUMAN RIGHTS FOR WOMEN, INC.

Human Rights for Women, Inc., is a non-profit tax exempt organization, which was incorporated in the District of Columbia in December, 1968. Its purposes are to provide volunteer legal assistance in litigation involving rights of women under the law, to undertake research on

issues relevant to discrimination against women, and to provide for educational projects on conditions concerning women.

The issues in this case are highly significant in defining the rights of women under the law, a matter of central concern to Human Rights for Women. HRW believes that laws which deny or severely limit the availability of abortion (1) fundamentally restrict women in their right to self-determination as human beings, (2) lead women to attempt self-inflicted abortions or to seek illegal abortions by non-medical personnel at grave risk to life and health, and (3) discriminate against women on the basis of sex by visiting "punishment" for intercourse not for procreative purposes only on women and not on their male partners.

Until the instant case, HRW has devoted its efforts to furnishing legal counsel to women in cases involving sex discrimination in employment. The denial of equal job opportunities to women continues to be a major concern of HRW. A primary cause of sex prejudice against women in employment is that women of child bearing age frequently do become pregnant regardless of their intentions and life plans, they do have children, and society—by law and custom—imposes "special responsibilities" on women in the actual rearing of their children. Restrictions on the right of a woman to terminate an unwanted pregnancy not only reduce her to a reproductive instrument of the State, but effectively limit her opportunities to work to earn a living and to contribute to the Nation's economy, its policies and decisions, on an equal footing with men. The fact that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, prohibits this kind of employment discrimination against women does not prevent it from happening.

In accordance with Rule 42(2) of the Rules of the Supreme Court, the Solicitor General in behalf of the United States and the attorneys for the Appellee, Dr. Vuitch, have given written consent to the filing of an *amicus curiae* brief by Human Rights for Women, Inc.

Human Rights for Women wishes to make clear two points in regard to its position on abortion: First, we do not want to be understood as anywhere intending to show opposition to, or denigration of, contraception. However, many thousands of women do not use birth control, either because they do not know of it, or because they do not have access to it. Many women cannot use the most effective means, The Pill, for a variety of medical reasons. Furthermore, even if every woman in America of childbearing age were using The Pill, the 1% failure rate would still result in close to 230,000 unwanted pregnancies per year. Tietze, "Oral and Interuterine Contraception: Effectiveness and Safety," *International Journal of Fertility*, Oct.-Dec. 1968, P.379. Human Rights for Women does not advocate abortion as a substitute for contraception.

Secondly, we are not arguing only for the right of the most extreme hardship cases to be afforded abortion care. We are arguing for the right of *every* woman to safe, legal abortions, without humiliation and red tape. An eminent woman sociologist points out:

> "It is the situation *of not wanting a child* that covers the main rather than the exceptional abortion situation. But this fact is seldom faced. I believe many people are unwilling to confront this fact because it goes counter to the expectation that women are nurturant, loving creatures who welcome every new possibility of adding a member of the human race. To come to grips with the central motivation that drives women to abortion, *that they do not want the child*, requires admitting that the traditional expectation is a gross oversimplification of the nature of women and the complex of values which determine their highly individuated response to the prospects of maternity." Rossi, "Abortion Laws and Their Victims," *Transaction*, Sept./Oct. 1966

We believe that any examination of the legal status of abortion in 1970 must be seen in this light.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731, to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute on which the indictment is founded, where the statute applies only in the District of Columbia.

2. Whether the District of Columbia abortion statute, 22 D.C. Code 201, is unconstitutional.

STATEMENT

Dr. Milan Vuitch, a licensed physician, was indicted for violating the District of Columbia abortion law, 22 D.C. Code 201, which prohibits a competent licensed physician from producing an abortion unless it is "necessary for the preservation of the mother's (sic) life or health." The District Court for the District of Columbia dismissed the indictment on the ground that the D.C. abortion law was unconstitutional as applied against physicians. 305 F. Supp, 1032, 1034. A direct appeal was taken to this Court under the Criminal Appeals Act, 18 U.S.C. 3731.

ARGUMENT

1. THE COURT HAS JURISDICTION OVER THIS APPEAL.

The Criminal Appeals Act, 18 U.S.C. 3731 provides that "[a]n appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States * * * [f]rom a decision or judgment setting aside, or dismissing any indictment * * * where such decision or judgment is based upon the invalidity of the statute upon which the indictment or information is founded." The plain meaning of this statute is to allow the United States to take a direct appeal to this Court in any

criminal case where an indictment is dismissed on the grounds of unconstitutionality of the statute, whether the statute be federal and national in scope, or applicable only in certain federal territory, or applicable only in the District of Columbia, as in the instant case.

The question is whether a direct appeal lies in this case, since the statute held unconstitutional applies only in the District of Columbia rather than nation-wide. We think a direct appeal lies and we agree, in general, with the Government's analysis on this issue (Govt. br. pp 10-22). We would like to emphasize two points: (1) This Court has held that a direct appeal lies from a three-judge court decision pursuant to 28 U.S.C. 2282, 1253 where the Act of Congress applies only in the District of Columbia. *Shapiro v. Thompson,* 394 U.S. 618, 625, n. 4. The underlying purpose of allowing direct appeals in three-judge cases and in cases under the Criminal Appeals Act is the same—in both situations the enforcement of the law may be thwarted until a final ruling of the highest Court is had. (2) In *United States v. Sweet,* No. 577, O.T., 1969, decided June 29, 1970, (38 L. W. 3520), this Court remanded a case involving criminal statutes applicable only to the District of Columbia, to the Court of Appeals for the District of Columbia, pursuant to the remand provision of 18 U.S.C. 3731. That case differs from the instant case in that the Government did not appeal pursuant to the Criminal Appeals Act; it appealed to the Court of Appeals expressly pursuant to a local statute, 23 D.C. Code 105, and this Court has no jurisdiction to hear or to accept transfers of cases from the Court of Appeals appealed pursuant to that law.

2. THE D.C. ABORTION LAW WHICH PROHIBITS A PHYSICIAN FROM PERFORMING AN ABORTION UNLESS IT IS "NECESSARY FOR THE PRESERVATION OF THE MOTHER'S LIFE OR HEALTH" IS UNCONSTITUTIONALLY VAGUE.

The District of Columbia abortion law (22 D.C. Code 201) provides, in part:

> "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as *necessary for the preservation of the mother's* (sic) *life or health* and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; * * *" (emphasis supplied)

The District Court found the phrase "necessary for the preservation of the mother's life or health" unconstitutional in that it "fails to give that certainty which due process of law considers essential in a criminal statute." 305 F. Supp. 1032, 1034.

The lack of clarity in a law of this type is quite fully spelled out in the decision of the California court in *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194, cert. denied, 397 U.S. 915. The Government claims that the inclusion of "health" as well as "life" makes the D.C. statute more clear than the law held unconstitutional in *Belous* (Govt br. 39-40). While the inclusion of "health" may make less important the vagueness of "life," the term itself is even more vague. The Government states that "health" includes both mental and physical health (Govt br. 38-9). Presumably, in all cases where the woman is unmarried, giving birth to an "illegitimate" child would cause some damage to her mental health. Would a physician violate the law if he believed an abortion necessary on the ground that an additional child in a family would unduly tax the mother's physical health by reason of the additional work in rearing

the child? Would he (or she) be violating the law if he produced an abortion where the additional expense of an additional child would so lower the family's economic level that the mother could not afford adequate nutritious food?

Since abortion during the first trimester of pregnancy is less hazardous to life and health for women than completion of a pregnancy, it could be argued that it is virtually always in the interest of the health of a woman to abort rather than continue a pregnancy.

The Government asks the Court to give the law a clearer and more definite meaning by interpreting it to mean that it provides the physician a complete defense of good faith. (Govt br. 10, 32-37) But even if the physician were given a complete defense of good faith, the Government contends that the law would be violated if the abortion were performed on a woman who was not previously known to the physician. (Govt br. 28-29) Could such a woman return to the doctor's office the following day or week for her abortion? Further, the Government states that it is "highly unlikely" that indictments would be sought where there had been a "bona fide pre-abortion examination" by the doctor and "arguable health grounds" existed for an abortion. (Govt br. 37, nt. 29). While all of this may make the D.C. law more clear to the Government, it is doubtful that physicians would know with any certainty what actions are and what actions are not a violation of the law. This is especially true where the Government itself is speculative about the enforcement policy. And what if the enforcement policy changes with changed Government personnel? Will the Government announce its intentions as to what it regards as prohibited to the doctors in advance? We submit that the Government's proposed definition of the law does not clarify it, but makes it even more vague and uncertain. Even if it were possible to give a clear meaning to the law so that due process rights of offending physicians would not be violated, such interpretation would still be unconstitutional because it ignores and violates fundamental rights of women.

3. UNDER ANY READING OF THE STATUTE, THE PROHIBITION AGAINST ABORTIONS PERFORMED BY LICENSED PHYSICIANS VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS OF WOMEN.

A. The D.C. abortion law invades the privacy and liberty of women in matters related to marriage, family and sex, the right of every individual to the possession and control of her own person, and the right simply to be left alone, as guaranteed by the First, Fourth, Fifth and Ninth Amendments. *Griswold v. Connecticut,* 381 U.S. 479. See also, *Loving v. Virginia,* 388 U.S. 1; *Skinner v. Oklahoma,* 316 U.S. 535. The Constitution protects the right to marry (*Loving*) or not to marry; the right to use (or not use) contraceptives (*Griswold*); and the right to have offspring (*Skinner*). At least as important is the right to determine when and how many (if any) offspring one will have.

When the state makes it a crime for a woman to have an abortion in the first trimester of pregnancy, by a licensed physician, in accordance with accepted and proven medical procedures, the state is engaged in a drastic, massive interference with the liberty and privacy of her life.

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250, 251 (1891)

Yet, the moment a woman conceives, the state steps in to determine what will and will not go on in her womb. For so great an interference, Government must show compelling justification under its police power to protect public health, welfare or morals. Whatever may have been such justifications at the time the abortion statute was enacted nearly 70 years ago, they do not obtain today. Advanced techniques in performing abortions simply and safely are in sharp contrast to the dangers to life and health in any type of surgery at the turn of the century. The dismal

prospects of over-population, and particularly the changed status of women in this country, also invalidate the old justifications.

Not only do abortion laws no longer serve their original purpose of protecting the life and health of the pregnant woman, but a large scale public health problem is *created* by abortion laws. These wide ranging health problems are well documented by the *amicus curiae* brief of 167 deans of medical schools and chairmen of departments of obstetricts and gynecology in support of Dr. Leon Belous in *People v. Belous*, 71 Cal.2d 996 (1969), cert. denied, 397 U.S. 915 (1970).

> The(se) recorded facts bring one face-to-face with the hard, shocking almost brutal–reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge.

Those who argue that women suffer terrible emotional trauma from abortion are almost exclusively male. A woman sociologist and expert on sociological aspects of abortion has written:

> ". . . despite all claims to the contrary, there is no evidence that women who have had induced abortions are typically stricken with guilt and remorse as an aftermath." Rossi, "Abortion Laws and Their Victims," *Transaction*, Sept./Oct. 1966.

The undocumented wisdom gained by those who have guided many thousands of women through the safer channels of the underground reflect that women do indeed show one over-riding emotion after their abortions–relief.*

Furthermore, the law in question perpetuates a gigantic underground of criminal abortions, constituting one of the largest rackets in the United States. Millions of dollars are

---

*For a description of tactics and procedures for getting around restrictive abortion laws, see Maginnis and Phelan, *The Abortion Handbook for Responsible Women*, Contact Books, North Hollywood, Calif., 1969.

made off the desperate women who endure its risks. See Task Force Report: Organized Crime (GPO 1967), p. 121.

There is a great out-cry among many that repeal of abortion laws will threaten the moral fibre of our country, as if women, as a class, had the discretion of alleycats.

> It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity. *People v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970)

It has been argued that the state has an interest in protecting the life of the unborn, thereby subordinating the interests of an adult woman to a fetus. The fetus is believed by some to be a person and by others to be a mere appendage to the woman. The question of when life begins is one which theologians, scientists, and legal scholars have debated for centuries. But to accept one conviction over another would be a law respecting an establishment of religion, in violation of the First Amendment.

> We are invited to resolve the philosophical question . . . as to when an embryo becomes a child. For the purpose of this decision, we think it is sufficient to conclude that the mother's interests are superior to that of the unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute contends. *Babbitz v. McCann*, 306 F. Supp. 400 (E.D. Wis.)

Summing up the status of the fetus in regard to abortion laws,

> If there were life present at conception, abortions would not be permitted in cases of rape or incest,

> or the other exceptions any more than it would be permitted to terminate the life of a one-year old whose life had come as the result of rape or incest. *People v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970)

The reasons for so great an invasion of privacy, as the District of Columbia abortion statute makes into the lives of women, no longer exist. When the interests involved are weighed, there is no substantial class of situations to which the statute may apply.

B. The statute denies women, as a class, the equal protection of the law guaranteed by the Fifth Amendment *(Bolling* v. *Sharpe*, 347 U.S. 497) in that it denies or limits them in their opportunity to pursue higher education, to earn a living, through gainful employment, and, in general, to decide their own future, as men are so permitted.

The moment a woman conceives, the state steps in to make a fundamental decision as to her future. She no longer has any say, in most cases, as to whether she will finish school, or work for a living so as to avoid welfare. The state can decide that all her life plans must be dissolved, and she must become the unwilling carrier of an unwanted fetus and the unwilling mother of an unwanted child. Between 3/4 and one million such unwanted births occur each year in the United States. (The Westoff Study, Planned Parenthood–World Population, "The Extent of Unwanted Fertility in the U.S.," 1969).

Any law which requires any individual other than the pregnant woman herself to decide if the woman shall have an abortion, makes that woman appear to be, if not specifically stating, so feeble minded, so incompetent, so immature and irresponsible, that she must have a guardian (the state) to tell her what she may or may not do for her own good. The powerlessness that attends the uncontrolled breeding of a woman reduces her to the status of a cow.

The effect of the abortion statute is to penalize women in areas of their lives which have nothing to do with their

childbearing role. An accident of biology—the fact that women conceive and men do not—is used as an excuse to discriminate against women in jobs, admission to schools, fellowships and research grants, and so on.

Forty-three percent of all women over the age of sixteen were in the labor force in 1969. Women account for 38% of all workers. (U.S. Dept. of Labor, Women's Bureau, "Background Facts on Women Workers in the United States," 1970). Women are the sole support of 11% of all American families and 61% of the Nation's poor children live in families headed by women (U.S. Dept. of Labor, "Fact Sheet on the American Family in Poverty," 1968).

While men often escape the responsibilities of child rearing, mothers rarely do, and they find themselves and their children locked in poverty. Not only does "another pregnancy" interfere with the mother's job and earning power, nothing lowers a family's economic standard of living more effectively than too many children.

Moreover, abortion laws chill and deter women from expressing their sexuality, as men are so permitted, in that they fill incalcuably large numbers of women with dread and fear of sexual relations, even within marriage, because of the possibility of unwanted pregnancy, through contraceptive failure or human error.

C. Finally, we submit that the D.C. abortion law subjects women to involuntary servitude, contrary to the Thirteenth Amendment. There is nothing more demanding upon the body and person of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later.

It is accepted in our society that an individual has the right and privilege of donating his time, his services or his possessions to another without compensation, or to *refuse* to do so unless suitable and adequate compensation is offered and given in return. Pregnancy and the rearing of children are the giving of one's time, one's services, and one's possessions and it should be the right and privilege of

a woman to do so of her own free will. A woman, becoming pregnant unintentionally and against her will, is denied by the District of Columbia abortion statute her constitutional right of freedom from involuntary servitude.

CONCLUSION

The judgment of the District Court dismissing the indictment should be affirmed.

Respectfully submitted,

SYLVIA S. ELLISON
Attorney, Human Rights for Women, Inc., as Amicus Curiae

Human Rights for Women, Inc. and its counsel wish to acknowledge the assistance of Margot Champagne, a student at Hastings College of the Law, University of California, in the preparation of this brief.